

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 386

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

MANUFACTURERS TRUST COMPANY

**MOTION FOR LEAVE TO FILE PETITION FOR
REHEARING**

The Solicitor General respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the Government's petition for writ of certiorari in this case, entered on January 17, 1949. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the decision of the Court of Appeals for the Third Circuit in *Clark v. E. J. Lavino & Co.*, filed June 1, 1949, is in direct conflict with that of the Court of Appeals for the Second Circuit in this case, and thus has created a conflict of decisions in the Courts of Appeals which should be resolved by this Court. Although this petition

for rehearing is filed after the expiration of the time prescribed in Rule 33, the grounds upon which it is based arose after such time; and the Court clearly has power, in its discretion, to entertain the petition. *Roberts Sash & Door Co. v. United States*, 282 U. S. 829; *Duquesne Steel Foundry Co. v. Burnet*, 282 U. S. 830; *Douglas v. Willcuts*, 295 U. S. 722; *Silesian-American Corp. v. Clark*, 332 U. S. 469, 474; see *R. Simpson & Company v. C. I. R.*, 321 U. S. 225, 229.

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1949.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 386

**TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER**

v.

MANUFACTURERS TRUST COMPANY

**PETITION FOR REHEARING OF ORDER DENYING
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SECOND CIRCUIT**

The Solicitor General on behalf of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, prays that this Court grant rehearing of its order of January 17, 1949, denying the Government's petition for writ of certiorari, 335 U. S. 910, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the petition filed October 29, 1948, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of January 17, 1949, there was no conflict of decisions on the question sought to be reviewed. Since that time, a direct and explicit conflict has arisen. On June 1, 1949, the Court of Appeals for the Third Circuit

announced its unanimous decision in *Clark v. E. J. Lavino & Co.*, reversing on this point the decision of the District Court for the Eastern District of Pennsylvania, referred to on page 10 of the petition for writ of certiorari previously filed herein. (A copy of the opinion of the Court of Appeals for the Third Circuit is appended hereto.)

In the *Lavino* case, as in the present case, the Custodian, determining that a debt was owing to an enemy, vested that debt and subsequently issued a turnover directive demanding that a stated sum be paid over to him. As here, the debtor refused, asserting that it was entitled to a set-off. In both cases, judgment was entered requiring the debtor to pay over the sum demanded, leaving him to assert the claimed set-off in subsequent proceedings. The Courts of Appeals have, however, disagreed on the question, presented by the petition herein, whether the Custodian is entitled to interest on the sum demanded from the date of service of his directive. The Court of Appeals for the Third Circuit has held that the debtor "had an immediate duty to comply" (App. p. 12) with the turnover directive without resort to litigation, and that the Custodian was entitled to interest as damages for any delay in compliance. In so holding, the Third Circuit expressly recognized that the decision of the Second Circuit in the instant case was to the contrary. It said:

In *Clark v. Manufacturers Trust Co.*, *supra*,
under circumstances analogous to those at bar

the Court of Appeals for the Second Circuit held, one judge dissenting, that there is “* * * no reason to suppose that Congress intended the Custodian to get interest during the period elapsing between his demand for payment and the entry of judgment.” *We cannot agree.* Although Congress did not deal with interest in the Act the absence of an express provision respecting it does not preclude its award. [App., pp. 10-11] [Emphasis added.]

And it cited with approval the dissenting opinion of Judge Clark in the instant case (App., p. 12).

The Custodian and persons to whom his turnover directives are addressed are thus confronted with squarely opposing holdings on the question of the allowability of interest as damages for delay in compliance with such a directive. Unless that conflict is resolved, an unjustifiable discrimination between persons in different jurisdictions will result.

2. The question continues to be one of large practical importance in the administration of the Trading With the Enemy Act.¹ Turnover directives involving substantial sums of money—often far greater than that involved in the instant case—have been and will continue to be issued by the Custodian. To deny the Custodian any compensation for the unlawful withholding of money de-

¹ In addition to the cases referred to in the petition for writ of certiorari heretofore filed, the question has arisen also in *Clark v. Douthitt, et al.* (S.D.N.Y., Civil No. 36-196, now pending).

manded by him, and to permit the holder to continue to have the use of that money without charge during the period of unlawful detention, would, in the words of the Third Circuit, "place a premium upon disobedience to the mandate of the statute and reward the recalcitrant" (App., p. 12). Such encouragement of dilatory tactics would be totally inconsistent with the Act's purpose to ensure the speedy reduction to possession of enemy property without the delays of litigation. Cf. *Central Trust Co. v. Garvan*, 254 U. S. 554; *Silesian-American Corp. v. Markham*, 156 F. 2d 793, 798 (C. A. 2), affirmed, *sub nom. Silesian-American Corp. v. Clark*, 332 U. S. 469.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

PHILIP B. PERLMAN,
Solicitor General.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 9709.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO
THE ALIEN PROPERTY CUSTODIAN, APPELLANT,

v.

E. J. LAVINO & COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued February 7, 1949.

Before BIGGS, *Chief Judge*, and O'CONNELL and
KALODNER, *Circuit Judges*.

OPINION OF THE COURT—Filed June 1, 1949.

By BIGGS, *Chief Judge*.

The Attorney General, the Honorable Tom C. Clark, as successor² to the Alien Property Custodian, has appealed from the judgment of the court below directing E. J. Lavino & Company ("Lavino") to turn over and deliver to the Custodian the sum of \$25,000, insofar as the judgment failed to award interest.³

² By Executive Order No. 9788, effective October 15, 1946, 11 F. R. 11981 the Attorney General succeeded to the powers and duties of the Alien Property Custodian. For the purpose of convenience we shall employ the term "Custodian" as referring either to the Alien Property Custodian or to the Attorney General.

³ Though the turnover directive required Lavino to turn over the "... property with all dividends, accumulations and increment thereon ...", there is no showing that the fund received any accumulations or increment or that Lavino received any dividends. The notice of appeal raises but one question: *viz.*, the failure to award interest in the judgment.

In July, 1941 Lavino became indebted to Kawasaki Kisen Kaisha, Ltd. ("Kawasaki"), a Japanese shipping corporation, for \$72,753.27, the sum representing freight charges for the carriage of freight in one of the latter's vessels. Lavino paid Kawasaki \$47,753.27 but retained \$25,000, claiming this amount as a set-off against damages which Lavino asserted it sustained because of Kawasaki's breach of a prior contract in failing to deliver to Lavino a shipment of chrome ore, whereby, Lavino alleges, it was damaged to the extent of \$24,759.

On July 30, 1942 the Custodian, having determined that Kawasaki was an enemy national within the meaning of the Trading with the Enemy Act, 50 U. S. C. A. Appendix, Section 1 *et seq.*, issued two vesting orders, No. 77 and No. 80, by virtue of which all property of any nature whatsoever owned or controlled by, payable or deliverable to Kawasaki Kisen Kaisha, Ltd. and to Kawasaki Kisen Kabushiki Kaisha,⁴ another Japanese corporation, or to their American branches, vested in the Custodian. These vesting orders were served on Lavino on August 7, 1946.

On September 12, 1946 the Custodian issued a turnover directive to Lavino, directing it to pay \$25,000 to the Custodian, this sum, as we have said, being the balance due Kawasaki for transportation of freight. The order was served on Lavino on October 15, 1946. Upon Lavino's refusal to comply with the directive, the Custodian filed a petition

⁴ The relation of this Japanese corporation to Kawasaki Kisen Kaisha Ltd. does not appear from the record. No question concerning the status of the second Japanese corporation is raised by the parties.

in the court below, pursuant to Section 17⁵ of the Trading with the Enemy Act, 50 U. S. C. A. Appendix Section 17, in which he prayed that an order be entered requiring Lavino to “. . . deliver \$25,000 with interest thereon from September 5, 1942 to the petitioner . . .”. In its answer Lavino set forth its claim of set-off claiming damages by reason of alleged prior breach of contract but admitted that \$241 was due Kawasaki. This amount is the difference between the \$25,000 retained by Lavino and its claimed damages of \$24,759. Lavino asserted that it stood ready and willing to turn over the \$241 to the Custodian.

The court below entered judgment for the Custodian for \$25,000 and interest from September 5, 1942. Lavino then moved to vacate the judgment, contending that the Custodian was not entitled to interest. The court vacated the order, and, after a rehearing on the sole question of interest, entered judgment directing that the “. . . respondent [Lavino] forthwith turn over and deliver to the petitioner [the Custodian] the sum of \$25,000”, interest being omitted from the judgment.

The Custodian has appealed, contending (1) that he is entitled to interest at a reasonable rate on the amount of \$25,000 from October 15, 1946 (the date of the service of the turnover directive) to the date of Lavino's compliance therewith, and (2) that he

⁵ Section 17 provides as follows:

“The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court . . .”

is entitled to interest at 6% on the sum of \$25,000 from July 1, 1941 (the date Lavino became indebted for transportation to Kawasaki) until October 15, 1946 (the date of service of the turnover directive).⁶ Contention (2), *supra*, is based on the law of Pennsylvania which provides that interest at 6% accumulates on indebtedness from the date the debt should have been paid. Lavino for its part contends that the suit is possessory in character; that its purpose is to compel the transfer of a debt, and that under the Act the court below had no authority to do more than to direct the transfer to the Custodian of an amount of money equivalent to the debt. It follows, says Lavino, that the Custodian is not entitled to interest as a matter of law, citing *Clark v. Manufacturers Trust Company*, 2 Cir., 169 F. 2d 932, 936, cert. den. 335 U. S. 910.

The narrow question presented by the instant appeal is whether the Custodian is entitled to interest, and, if so, from what beginning date. The Act makes no provision for payment of interest where, as here, there is noncompliance with the Custodian's demand that enemy property be turned over to him.⁷ In *Clark v. Manufacturers Trust Co.*, *supra*, under circumstances analogous to those at bar the Court of Appeals for the Second Circuit

⁶ The Custodian contends that under Rule 54 (c) of the Rules of Civil Procedure the court below should have granted him the relief to which he was entitled even though he demanded interest on the \$25,000 only from September 5, 1942.

⁷ See, however, Section 16 of the Act, 50 U. S. C. A. Appendix, Section 16, which provides that "Whoever shall wilfully . . . refuse to comply with any order of the President issued in compliance with the provisions of this act, shall, upon conviction be fined not more than \$10,000, or, if a natural person, be imprisoned for not more than ten years, or both." In this connection see *Stoeck v. Wallace*, 255 U. S. 239, 245.

held, one judge dissenting, that there is “. . . no reason to suppose that Congress intended the Custodian to get interest during the period elapsing between his demand for payment and the entry of judgment.” We cannot agree. Although Congress did not deal with interest in the Act the absence of an express provision respecting it does not preclude its award.

In *Board of Comm'rs v. United States*, 308 U. S. 343, 349, 350, where, as in the instant case, the question was the right of the United States to collect interest prior to judgment in a suit to recover taxes wrongfully collected from an Indian ward of the United States by a county of the State of Kansas, the Supreme Court, speaking through Mr. Justice Frankfurter, pointed out that, “The issue is uncontrolled by any formal expression of the will of Congress,” and said, “In ordinary suits where the Government seeks, as between itself and a private litigant, to enforce a money claim ultimately derived from federal law, this implying a wish of Congress to collect what is deemed fairly owing according to traditional notions of Anglo-American law, the Court has chosen that rule as to interest which comports best with general notions of equity. *United States v. Sandborn*, 135 U. S. 271, 281. *Billings v. United States*, 232 U. S. 261. Instead of choosing a rigid rule, the Court has drawn upon those flexible considerations of equity which are established sources for judicial law making.” Compare also *Rodgers v. United States*, 332 U. S. 371, 373; *Royal Indemnity Co. v. United States*, 313 U. S. 289, 295-6. The Act creates the obligation to turn over on demand the property of the alien, not only to keep such property from being used for

the benefit of the enemy but also to "affirmatively compel the use and application of foreign property" in "the interest of and for the benefit of the United States." See H. R. Rep. No. 1507, 77th Cong., 1st Sess. pp. 2-3; 55 Stat. 839, 50 U. S. C. App. 5 (b) (1).

When the Custodian served his turnover directive upon Lavino the latter had an immediate duty to comply. The statute requires an immediate transfer of the property to the Custodian without resort to the courts by the holders of the property. On surrender of the property Lavino could have at once filed suit under Section 9 of the Act, 50 U. S. C. A. Appendix, Section 9, and in that proceeding could have litigated fully and adequately its claim of set-off. See *Stoehr v. Wallace*, 255 U. S. 239, 245-6, and *Central Trust Co. v. Garvan*, 254 U. S. 554, 566-8. As was said in the *Garvan* case, "The occasion of the duty is a demand after determination by the President and it is hard to give such meaning to the words 'which the President after investigation shall determine is so . . . held' unless the determination and demand call the duty into being." Lavino, in disregard of that legal duty, refused to comply with the turnover directive, retaining the sum of \$25,000, though Congress had created a remedy adequate for its relief in Section 9 of the Act. Lavino had the use of the money during the period of retention.

We conclude that the United States is entitled to interest from the date of service of the demand, viz., October 15, 1946, to the date of the judgment

of the court below.⁸ To hold otherwise would place a premium upon disobedience to the mandate of the statute and reward the recalcitrant. See the cases cited, *supra*, and the brief dissent of Judge Clark in the Manufacturers Trust Co. case, *supra*.

We cannot agree with the contention of the Custodian that the law of Pennsylvania has any application here. We are adjudicating a federal question arising under an Act of Congress, and, in the absence of an applicable federal statute, it is for the federal court to award, according to its own criteria, appropriate damages expressed in terms of interest. Compare *Royal Indemnity Co. v. United States*, *supra*, 313 U. S. at p. 296. As the duty to transfer the property arises only on demand by the Custodian, such a demand, followed by non-compliance, constitutes the condition precedent necessary to accrual of interest on the debt for the benefit of the Custodian. But there is no statute and no acceptable legal theory which would award interest prior to the Custodian's demand. Indeed to award the Custodian interest on the sum demanded prior to the date of the turnover directive would penalize the debtor for delays by the Custodian wholly beyond the debtor's control. To impose such a burden on the debtor would not be just.

The judgment of the court below will be reversed with the direction to award interest on the sum of \$25,000 from the date of service of the turnover directive, *viz.*, October 15, 1946 to the date of judg-

⁸ Interest on the judgment is not in issue here.

ment in the court below. Interest on the judgment when modified should of course follow the usual rule.

A true Copy: Teste.

*Clerk of the United States
Court of Appeals for the Third Circuit.*